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Chairman: Mr. Lelong ..... (Haiti)

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01-61331 (E)

The meeting was called to order at 3.15 p.m.

Agenda item 162: Report of the International Law Commission on the work of its fifty-third session (*continued*) (A/56/10 and Corr.1)

1. **Mr. Winkler** (Austria) said that he welcomed the International Law Commission's adoption of the draft articles on State responsibility and the Commission's recommendation to the General Assembly with respect to those articles (A/56/10, paras. 72 and 73).

2. The Austrian delegation fully supported the approach recommended by the Commission. It reiterated that the draft articles should be adopted as part of a resolution so that they would become a non-binding legal instrument, without excluding the possibility of convening an international conference for the conclusion of a convention on the subject at a later stage. Moreover, the adoption of the draft articles as an annex to a General Assembly resolution would make it possible to test the articles' adequacy in the light of State practice. If an international conference was convened, its work could usefully be based on the experience thus acquired; if not, the articles could, to the extent that they were accepted in State practice, serve as a code of conduct on State responsibility.

3. Recent events had shown that State responsibility was a very sensitive subject and, together with the principles of the non-use of force and non-intervention, to which it was closely related, perhaps the most politically charged area of international law. A code of conduct was the best means of consolidating the law of State responsibility, even if that meant, in the short term, that deviations might occur and might have to be tolerated.

4. In addition to stating rules in writing, a code of conduct had an educational function in that it could help to consolidate *opinio juris* in respect of rules that codified custom. It was also a useful tool for the progressive development of law, as shown by the manner in which various branches of international law had developed.

5. His delegation believed that, in the long term, the perceived fairness of the code would lead to its acceptance and then to an adjustment of the conduct referred to in the draft articles on State responsibility for internationally wrongful acts. At the current stage, the General Assembly and the international community should seek to convince States that well-defined rules were in the interest of both the victims of violations and the alleged wrongdoers, since the draft articles endeavoured to strike a balance between the legitimate interest of victims of wrongful acts in pursuing their rights and the equally legitimate interest of alleged wrongdoers in being protected against abuse or excessive or humiliating demands.

6. Noting that some delegations regretted the lack of provisions on the peaceful settlement of disputes, Austria felt that the omission was necessary in view of the proposal to annex the text to a resolution.

7. With respect to the prevention of transboundary harm from hazardous activities, the Commission's adoption of draft articles on the issue was a major step forward in the elaboration of international law in that area. Austria had always given priority to the codification and progressive development of international law on the prevention of transboundary harm. He recalled that Austria and the European Community had made many proposals in that regard and that the prevention of harm was one of the most important aspects of action to achieve sustainable development.

8. The draft articles were of fundamental importance to the international community. Austria strongly supported the International Law Commission's recommendation on the elaboration of a convention, and was convinced that such a convention could be adopted within a relatively short period. Austria was satisfied with the text as a whole and hoped that the General Assembly would follow the Commission's recommendation, but nonetheless wished to comment on some of the draft articles.

9. With regard to article 1 (Scope), he questioned the relevance of the phrase "not prohibited by international law", since activities prohibited by international law fell within the scope of other rules of international law. The relationship between article 3 and article 10, which listed the factors determining whether an activity was to be permitted or not, needed clarification. It might be wondered how those factors should be taken into consideration under article 3 to determine whether a State had fulfilled its obligations under that provision. His delegation further considered that the wording of article 5 should bring out more clearly the obligation of States to take the necessary measures without undue delay. It supported the ideas

expressed in articles 9 and 10 and regarded the obligation of States concerned to enter into "consultations on preventive measures" and to take into consideration "factors involved in an equitable balance of interests" as essential for preventing transboundary harm as far as possible. Article 9, paragraph 3 contained an important provision for achieving the goal of sustainable development. The commentary on article 18 ("Relationship to other rules of international law") specified that the obligation incurred by States under that article was intended to extend both to rules having a particular application and to rules which were universal or general in scope. The effects of such a provision on the application of the draft articles would have to be thoroughly examined; Austria remained open to any discussion of article 18.

10. On the subject of chapter VI, concerning reservations to treaties, his delegation considered that draft guideline 2.2.3 (Reservations formulated upon signature when a treaty expressly so provides) aimed at constituting an exception to the general rule contained in guideline 2.2.1 (Formal confirmation of reservations formulated when signing a treaty); it questioned the solidity of State practice regarding confirmation of reservations and how those confirmations were interpreted. Recalling the wording of guidelines 2.3.1 (Late formulation of a reservation) and 2.3.2 (Acceptance of late formulation of a reservation), his delegation was very concerned that such guidelines would have the effect of making the whole regime of treaty reservations also applicable to so-called late reservations, which did not fall under the definition of reservations as reflected in article 19 of the Vienna Convention on the Law of Treaties. The International Law Commission had itself defined reservations with the clear intention of not deviating from the Vienna Convention, and the definition it gave contained a clear reference to the point in time when a reservation could be made and made no provision for the case of "late" reservations. The consequence was that, even if it were called a "reservation", a late reservation constituted in reality a different kind of declaration from true reservations and should be kept apart from them. Of course, the States parties to a given treaty would always have the possibility of agreeing to apply the regime of reservations to "late" reservations in respect of that treaty, but a declaration not consistent with the definition of reservation in the strict sense should not be considered as a reservation. The approach suggested in the draft guidelines could compromise the basic principle of *pacta sunt servanda*, and the application of a regime of "late reservations" would result in the creation of a system of amendments to treaties which would be contrary to the rules set out in articles 39 to 41 of the Vienna Convention.

11. His delegation also wondered whether the draft guidelines on interpretative declarations were in conformity with article 31 of the Vienna Convention. Moreover, the concept of conditional interpretative declarations seemed rather vague and his delegation doubted the utility of giving it separate treatment. A conditional interpretative declaration had effects very similar to those of a reservation and when formulated by a State could call in question its commitment to the treaty in question. His delegation did not wish to encourage recourse to such declarations as "interpretative declarations" but was ready to contribute to clarification of the concept if dealt with in the area of reservations.

12. He concluded by referring to the International Law Commission's decision to appoint two Special Rapporteurs on two of the five topics included in its long-term programme of work. Although that marked Austria's particular interest in the question of responsibility of international organizations and the issue of shared natural resources, his delegation nevertheless asked the Commission to clarify their content.

13. **Mr. Leanza** (Italy) noted that the most important amendments to the earlier draft articles tended to improve the structure of the draft and clarify some basic criteria, such as *ultra vires* conduct. The clarifications made to chapter V (Circumstances precluding wrongfulness), although they were drafting changes, were very timely. Particular mention might be made of article 25, paragraph 1 (b), where the expression "international community of States as a whole" had been replaced by "international community as a whole", in order to draw a distinction between the community of States to which the Vienna Convention referred, taking States as bodies which played a role in establishing international legal norms, and the international community as a group of bodies which were not exclusively States.

14. His delegation reaffirmed its position vis-à-vis the concept of the responsibility of States for wrongful acts and the distinction between international crimes and international delicts. Customary international law

already provided that the breaching of certain obligations established to protect the interests of the international community was a direct infringement of the subjective rights of all States and gave them the right to invoke the responsibility of the State which had breached obligations which the International Court of Justice termed obligations *erga omnes*. Since it was necessary and very important to adopt the draft articles *in toto*, his delegation had accepted the compromise proposed by the Commission to delete the term "crime" and to keep the essentials of a specific set of regulations, while it did not contest the new definition of serious violations appearing in article 40. However, the complex distinction between obligations *erga omnes*, peremptory norms and international crimes committed by the State must be brought out, since in adopting the new wording of article 40, the Commission seemed to be extending the category of serious wrongful acts compared with that comprising international crimes.

15. Recalling the two criteria that enabled serious breaches of obligations to be distinguished from other types of breaches (namely, the character of the obligation breached and the intensity of the breach), he emphasized the impreciseness of the wording proposed by the Commission in relation to the notions of peremptory norm of general international law and intensity of the breach. The Vienna Convention on the Law of Treaties contained a tautological definition of peremptory law, which doctrine and jurisprudence had endeavoured to interpret as being a framework of rules prohibiting conduct judged intolerable because of the threat it posed to the survival of States and peoples and to basic human values. On the basis of that general definition, rules prohibiting aggression, torture, slavery, genocide and apartheid, inter alia, had been considered peremptory. The intensity of the breach had to be evaluated in the light of the concepts of flagrant or systematic breach of an international obligation arising out of a peremptory norm. That evaluation could, however, give rise to differences capable of complicating the application of article 40.

16. His delegation regarded the provisions of article 41 (Particular consequences of a serious breach of an obligation under this chapter) as generally acceptable, even though they were in the nature of a *compromis* and had to be defined case by case, according to the circumstances. The obligations referred to in article 41 were obligations *erga omnes* and would apply, where appropriate, to all members of the international community.

17. The Italian Government fully supported the changes made by the Commission to Part Three, chapter I, of the draft articles (Invocation of the responsibility of a State) and endorsed the Commission's decision to eliminate, in chapter II, the distinction between countermeasures and provisional countermeasures. The wording of article 54 (Measures taken by States other than an injured State) was acceptable because it provided for the surmounting of differences with respect to measures which a State other than an injured State could take against the State responsible for the wrongful act. Italy had no objection to the inclusion of a saving clause, even if it enlarged the scope of the provision.

18. His Government was not in favour of transforming the draft articles into an international convention, as to do so would require inter-State negotiations and would delay or even prejudice the adoption of the text. A non-binding instrument would be preferable, and the General Assembly could adopt a resolution drawing States' attention to the draft articles. By approving the draft, a State would not, however, be signifying a conviction that all the rules therein conformed to customary international law, and the way would remain open to a subsequent consideration of controversial issues.

19. **Mr. Dinstein** (Israel) said that he shared the opinion of the Special Rapporteur and the International Law Commission that the General Assembly should take note of the draft articles on State responsibility and annex them to its resolution. The final text should be widely disseminated in order to go through the crucible of international theory and practice and to receive the imprimatur of scholars and courts before a diplomatic conference was convened to transform it into a treaty.

20. The draft articles were largely the mirror image of customary international law but had the merit of sharpening the picture. Unfortunately, a number of the provisions limited themselves to the rudiments of the law applicable, regardless of the maxim "the Devil is in the details". In some instances, the Commission was studying the details in question, as in the case of nationality of claims and exhaustion of local remedies mentioned in article 44. Where the missing details were not to be the subject of further codification, they could

emerge from ongoing practice. That was true of article 36, which did not determine the international standard of compensation, and article 38, which did not address the issue of the proper interest rate adjusted for inflation.

21. His delegation, which had already expressed its concern with regard to certain provisions, regretted that the draft articles did not shed light on the controversial scope of *jus cogens* or on the ambit of obligations *erga omnes*. Even though the commentary dealt in greater detail with the question of definitions, his delegation was not convinced, unlike the Special Rapporteur, that *jus cogens* coincided with the norms listed by the latter. In the legal literature, there was a tendency to spread the wings of *jus cogens* to an ever-growing list of rules of international law, and it was perhaps time to consider to what extent any such enumeration was justified. Clearly, when the bounds of *jus cogens* were in question, the overall reference to automatic consequences of serious breaches might prove impracticable. Consequences deemed natural in the case of, say, genocide, might prove totally inappropriate if *jus cogens* was stretched too far. As stated by the representative of Finland on behalf of the Nordic States, having a dual regime of consequences, in the case of serious breaches of *jus cogens* on the one hand and obligations *erga omnes* on the other, might lead to abuse and was not reflected in customary international law. The explanation for the problems perhaps lay in the fact that the text of the draft articles still carried scars from the battle over "crimes" and "delicts".

22. Since the draft articles were not crafted as a treaty, the decision not to provide for dispute settlement mechanisms was welcome. The law of State responsibility consisted of secondary rules that, in one way or another, had an impact on the primary rules of international law. If dispute settlement mechanisms were to apply in all disputes arising where State responsibility was at issue, they might have the effect of providing a blanket cover for almost all inter-State disputes, and the majority of States would not be ready to accept such a revolutionary change. It would be better, and certainly more prudent, to leave the matter of compulsory dispute settlement to be addressed separately and specifically in each instrument setting out primary rules governing a particular aspect of international law.

23. **Mr. Fomba** (Mali) noted that the question of State responsibility was central to international law and said that the draft articles basically attempted to better reflect the principle of the universality of international law and the legal equality of States, to promote increased visibility of the international community as an active force, to proclaim the principle of the moralization of State conduct and the need to halt abuses linked to States' political and economic inequality, and to better crystallize the socializing and pacifying function of international law. The text, which had taken over 40 years to draft, had undoubtedly benefited from expertise and knowledge of exceptional quality, but important issues still posed difficulties.

24. With regard to the question of serious breaches of obligations to the international community as a whole, his delegation found the topic promising, insofar as it was based on the premise that the international community constituted an influential force and that its survival and enrichment required respect for norms so fundamental that there should be no departure from them. His delegation noted the ILC common position that the chapter should be retained on two conditions: article 42, paragraph 1, concerning damages reflecting the gravity of the breach, would be deleted and the phrase "an obligation owed to the international community as a whole and essential for the protection of its fundamental interests" would be replaced by the words "peremptory norms". In that connection, the Malian delegation supported the basic idea underlying chapter III and was in favour of maintaining it. It believed that the deletion of article 42, paragraph 1, was appropriate, inasmuch as its retention created more difficulties than it would resolve, endorsed the arguments adduced in support of the preference for the concept of peremptory norms despite its problematic content and expressed reservations about the minor character of certain breaches of those norms. With regard to the further consideration of certain aspects of the consequences of serious breaches, his delegation basically considered that the existing wording of article 41 was acceptable on the whole, but that certain aspects should be clarified, such as the obligation not to "render aid or assistance" or the scope of the term "further consequences", provided that the text remained within the limits of what was reasonable and emphasized the result much more than the means, without prejudice to the advisability of specifying procedural rules of behaviour subsequently, for example in an annexed document or a protocol. On the

issue of limiting the sphere of application to situations actually covered by the chapter, the existing version of the text did not seem to give rise to any particular concern. Articles 41, 48 and 54 should be brought more closely into line.

25. Without questioning the right to resort to countermeasures, his delegation believed that their use should be accompanied by necessary and sufficient guarantees to limit abuse. It noted that, during the consideration of that question, ILC had been divided into three groups: those who advocated maintaining the chapter as it stood, those who wanted the chapter to be improved and those who favoured simply deleting it. The Malian delegation had not, however, had time to consider in depth the arguments advanced in support of the various positions. The question of countermeasures taken by States other than an injured State (article 54) had also divided ILC. In that regard, the Commission's conclusions essentially amounted to alterations or realterations of a technical nature which did not seem to pose any special difficulty.

26. With regard to the overall configuration of chapter II, the Malian delegation welcomed the fact that the function of countermeasures was presented in terms of an inducement to respect the primary obligation and not from the punitive viewpoint. The limitations of the scope *ratione temporis* and *ratione materiae* of countermeasures, as envisaged in articles 49 and 50, appeared at first sight to be sufficiently important to provide good protection against inherent dangers if efforts were made to respect the hard core of international law. The principle of proportionality played an important role in the balanced regulation of relationships of force and therefore of relationships of cause and effect. The gradual procedural precautions provided for in article 2 were part of the systematic effort to achieve pacification in relationships of force. However, urgent countermeasures needed to preserve the rights of an injured State should be truly protective in character. In addition, the suspension of countermeasures without undue delay in the event that the wrongful act had ceased or the dispute was pending before a compulsory settlement body was a logical consequence of the very function of countermeasures. The exception of non-implementation in good faith of dispute settlement procedures seemed to be obvious. The rule of automatic termination of countermeasures as soon as the responsible State had complied with its obligations (article 53) required greater vigilance and a strong sense of responsibility on the part of States, especially powerful ones.

27. With regard to the question of dispute settlement provisions, his delegation was receptive to the arguments developed in paragraph 57 of the report under consideration by the proponents of that theory. The existing text of articles 50 and 52 was contrary to neither the spirit nor the letter of Article 33 of the Charter, inasmuch as it proposed a mainly optional and gradual procedural system. However, his delegation appreciated the wisdom of the approach whereby ILC would refer the matter to the General Assembly and draw attention to the dispute settlement machinery which it had evolved in 1996 and which offered practical advantages. There were three options with regard to the question of responsibility: maintenance of the status quo — in other words, reference to customary international law; formal restatement of the essence of that law; and the proposal to create *sui generis* machinery along the lines of the 1996 machinery. His delegation had no definite position on the question at that stage.

28. In principle, the draft articles should take the form of a convention or, failing that, the recommendation of the Commission for a two-stage process should be implemented; that would entail, first, taking note of the draft articles in a resolution and annexing the text to the resolution — a procedure that had the practical advantage of allowing time for States, particularly small States, to better evaluate the draft articles, which were vital for the peaceful regulation of international relations and the democratization of international law, provided that that did not serve as a pretext for abandoning the initiative — then, considering the convening of an international conference of plenipotentiaries to examine the draft articles with a view to concluding a convention and dealing, at the same time, with the issue of the settlement of disputes.

29. He broadly shared the concerns expressed by the representative of Morocco, particularly with respect to the political choices underlying the draft articles. His delegation remained open to the proposal concerning the establishment of an ad hoc committee or a working group to complete the process by making the final political decisions.

30. **Mr. Czapliński** (Poland) said, with regard to State responsibility, that the draft articles constituted a

well-balanced compromise and that it would be extremely difficult to introduce amendments that could be accepted by all States. Moreover, the saving clauses included in the draft articles left sufficient room for manoeuvre for the States concerned involved in specific international legal disputes. The scholarly and exhaustive commentary to the draft articles provided answers to the many questions posed by the articles.

31. His delegation nevertheless wished to raise a certain number of problems. Thus, the issue of the attribution to a State of acts of non-State entities, as set out in articles 5 and 9, was not sufficiently clear. The notions of control, direction and instructions, as used in chapter II, should be clarified in the commentary. Likewise, his delegation would welcome the clear enunciation of the responsibility of States for the activities of parastatal organizations or agencies, which would enable the responsibility of de facto regimes to be engaged under international law.

32. His delegation was not entirely convinced that the distinction made in articles 24 and 25, respectively, between distress and necessity was really justified and should be included in the draft articles. Those two situations were in fact very similar, and distinguishing between them opened the way to casuistic regulation. The same was true of article 38 on interest. If article 24 should be maintained, his delegation found it rather lacking in consequence. The value it protected was human life, deemed one of the core human rights, the protection of which was often considered to be the peremptory norm of international law par excellence, as the International Court of Justice had pointed out in the Case concerning *United States Diplomatic and Consular Staff in Tehran*. In the great majority of cases, the State acting in a situation of distress would do so in the circumstances envisaged in article 24, paragraph 2. His delegation therefore considered it inappropriate to exclude the possibility for a State of invoking the necessity of protecting human life if the dangerous situation was due to its own conduct. The conduct of the State concerned should rather be seen as conforming to the fundamental norm of international law and, therefore, as precluding the wrongfulness of the act, notwithstanding the circumstances.

33. His delegation was also somewhat surprised that the commentary to article 24 referred to acts that were usually committed by private actors (like commanders of ships or aircraft, for example) but attributed those acts to the State concerned. The reference, in that context, to article 14 of the 1958 Convention on the Territorial Sea and the Contiguous Zone was hardly appropriate. Logically, a similar argument could be made against the corresponding provision of article 25, paragraph 2 (b).

34. In addition, although his delegation supported the idea of introducing in the draft articles the notion of serious breaches of peremptory norms of general international law, it was not fully satisfied with the proposed article. First, it did not see why the serious breaches should be limited to peremptory norms of international law. It seemed to his delegation that there was no general agreement as to the nature and scope of those norms and that, contrary to what was stated in paragraph 5 of the commentary to article 26, there was no convincing practice in international law of accepting *jus cogens*. Second, there were numerous norms of international law (like humanitarian norms or diplomatic law) which had never been put forward as peremptory norms, but which were of fundamental importance for the international community and deserved to be adequately protected. Third, the consequences of a breach of the peremptory norms, as proposed in article 41, corresponded to the effects of a violation of any norm of international law; they were not therefore limited to serious breaches of peremptory norms. Fourth, his delegation could see little justification for the distinction between serious breaches and regular breaches of peremptory norms proposed by the Commission, particularly since article 53 of the Vienna Convention on the Law of Treaties provided a treaty was void if it conflicted with a peremptory norm, notwithstanding the gravity or degree of the conflict. The distinction proposed was not supported by the current practice of international law. Lastly, his delegation did not see a clear link between article 41, on the one hand, and articles 48 and 54, on the other; article 48 seemed to refer to obligations *erga omnes*, since it recognized the right of any State to invoke the responsibility of the author of a violation of international law (thus establishing a procedural right, rather than a substantive one), and peremptory norms and obligations *erga omnes* seemed to belong to different categories (although they were not mutually exclusive).

35. With regard to draft article 50 he had certain difficulties which the commentary did not resolve fully; he wondered, for instance, whether the examples used in paragraph 1 (a), (b) and (c) were to be regarded

as examples of peremptory norms. If so, the international obligations set out in subparagraph (c) differed from the obligations set out in subparagraphs (a) and (b), because doctrine had largely confirmed the latter's classification as *jus cogens*. The inclusion of obligations of a humanitarian nature in paragraph 1 enlarged the scope of peremptory norms to include norms of a fundamental nature for the international legal order that had not previously been classified as peremptory. If that was the case, subparagraph (d) was to be regarded as corresponding mainly to the notion of *jus cogens superveniens* under article 64 of the 1969 Vienna Convention on the Law of Treaties. The question also arose as to whether the expression "general international law", as used in subparagraph (d), suggested the exclusively customary nature of peremptory norms, which would be consistent with doctrine. If that was not the case, his delegation proposed that the word "general" should be omitted in subparagraph (d).

36. His delegation supported the recommendation that the General Assembly should take note of the draft articles and annex them to a resolution, on the understanding that that would be a first step towards the adoption of a binding instrument.

37. **Mr. Subedi** (Nepal) said that it was the first time that his delegation had taken the floor before the Committee and it was doing so at a time when constantly unfolding events, whether terrorist or otherwise, called for a new and systematic approach to international law-making in order to achieve international cooperation for the progress of humanity and civilization. History appeared to be repeating itself, and that made the reasons for which the International Law Commission had been established 50 years earlier more valid than ever.

38. The objective of international law should be to promote justice, not only among nations but also across generations. It was therefore necessary to ensure its development, not only in traditional areas of international activity, but also in modern and evolving areas of activity; for example, in the joint management of shared natural resources and information technology. The ever-increasing use of information technology, particularly as a primary vehicle of globalization, and the absence of a global treaty to regulate it should encourage the Commission to give serious consideration to including it as a potential subject of study.

39. There was a well-developed body of law dealing with both living and non-living marine resources. Water itself was a natural resource and the very significant Convention on the Law of the Non-navigational Uses of International Watercourses had been adopted in 1997. However, there were other activities relating to water that were not covered by the Convention. There were also a number of shared natural resources about which the law was insufficiently developed. For example, the ever-expanding activities relating to the exploration and exploitation of such resources, which would be subject to increasing competition, since they would have to satisfy the needs of present and future generations. The Commission could play a very effective role in such areas.

40. With regard to the report of the Commission and the question of State responsibility, he favoured the adoption by the General Assembly of a resolution on the draft articles that would lead to a diplomatic conference in order to adopt a legally-binding global treaty.

41. However, returning to draft articles 40 and 41, which referred to "serious" breaches of obligations *erga omnes*, although the Commission had specified what it meant by "serious" in that context in article 40, paragraph (2), the qualitative distinction that it had made might give rise to some controversy when the articles were applied. Since there could be no derogation from the principles of *jus cogens*, his delegation wished to study the distinction made by the Commission more carefully.

42. The same was true of the provisions relating to countermeasures in chapter II of part three. Although the Commission had been very careful when defining the conditions and limitations of the countermeasures permissible under the proposed draft articles, his delegation would like to examine those provisions in the light of Article 33 of the Charter of the United Nations and other doctrines concerning the settlement of disputes, whether large or small, between States. It was precisely because the mission of the United Nations was to create an international society based on the rule of law that his delegation wished to examine the role countermeasures should play in a world which already had so many dispute settlement mechanisms, and to what extent it should be prepared to accept the notion of countermeasures, no matter how limited the scope under the proposed draft articles.

43. With regard to the recommendations of the Commission on the elaboration of a convention by the General Assembly based on the draft articles on prevention of transboundary harm from hazardous activities, his delegation considered that a working group of the Sixth Committee should be established to examine the draft articles more closely. The area under consideration touched on a vast range of issues covered by a number of international treaties and international organizations. The Commission was to be congratulated for the draft articles it had drawn up, but it was still too soon to relinquish the matter and submit it to the General Assembly. It would be preferable to request the Commission to elaborate a draft convention itself, on the basis of its draft articles, and then recommend it to the General Assembly for adoption.

44. **Mr. Jacovides** (Cyprus) said that the current debate was intended to provide the opportunity for representatives of States to offer an evaluation of the report of the International Law Commission, to make general comments on the topics under consideration and to provide answers in respect of issues where the Commission needed the guidance of the General Assembly in its work. The views expressed orally by Governments during the debate should be given the same weight as the written comments of States in response to the questionnaires. Small States, in particular, were necessarily limited in resources for producing written comments on a large variety of topics.

45. His delegation noted with satisfaction that the Commission had completed the second reading of the draft articles on State responsibility and had recommended that the General Assembly should take note of the articles in a resolution, to which they would be annexed, with a view to eventually considering the possibility of convening an international conference of plenipotentiaries to examine the draft articles and adopt a convention based thereon.

46. With regard to international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage resulting from hazardous activities), his delegation noted with satisfaction that the Commission had completed the second reading of the draft articles on that topic and had recommended the elaboration of a convention based thereon by the General Assembly. His delegation commended the Special Rapporteur, Mr. Rao, and trusted that the recommendation would be duly acted upon.

47. As for reservations to treaties, his delegation noted the progress that had been made through the adoption of draft guidelines on the formulation of reservations and interpretative declarations, commended the work of the Special Rapporteur, Mr. Pellet, and looked forward to the early completion of the Guide to Practice that would result from the work on the topic. In response to the question discussed in paragraph 20 of the Commission's report, his delegation felt that it would be preferable for the Commission not to include in its draft Guide to Practice draft guidelines specifically relating to conditional interpretative declarations. Nothing should be done to unduly encourage the late formulation of reservations.

48. With regard to diplomatic protection, his delegation welcomed the progress made on the issues of continuous nationality, transferability of claims and the exhaustion of local remedies and commended the Special Rapporteur, Mr. Dugard, for his progressive approach to that very classical chapter of international law. More particularly, his delegation was inclined to answer in the affirmative the question asked in paragraph 28 (b), on protecting shareholders who were nationals of the State exercising the diplomatic protection.

49. On the topic of unilateral acts of States, his delegation thanked the Special Rapporteur, Mr. Rodríguez Cedeño, and, with regard to paragraph 29 of the report, felt that Governments should be encouraged to assist the Special Rapporteur by replying to the relevant questionnaire on State practice.

50. His delegation had been pleased to note the traditional exchanges of information between the Commission and, respectively, the International Court of Justice, the Asian-African Legal Consultative Committee, the Inter-American Juridical Committee and the Committee of Legal Advisers on Public International Law of the Council of Europe. Indeed, the current exchanges in New York between the President and members of the International Court of Justice, together with legal advisers from foreign ministries, and the Sixth Committee served the same purpose in a different setting. Such relations should be encouraged as a means of promoting the common objective of enhancing the role of international law, its codification

and its progressive development. It was no coincidence that major advances in the fight against international terrorism, such as Security Council resolution 1373 (2001) of 28 September 2001, had been achieved with unanimity in the Security Council, and his delegation hoped that the General Assembly would achieve equivalent results.

51. With regard, in particular, to chapter IV of the Commission's report, it was generally acknowledged that the topic of State responsibility was a very important one in international law. Initially, the topic had focused primarily on responsibility for injury to aliens; however, with the development of *jus cogens* and its acceptance in the 1969 Vienna Convention on the Law of Treaties, and the existence of hierarchically higher rules as set out in the Charter of the United Nations, State responsibility currently rested on a much broader foundation. Moreover, it was acknowledged also by the International Court of Justice, beginning with the *Barcelona Traction* case in 1970, that *erga omnes* obligations existed and that the interests of the whole international community and of international public policy needed to be taken into account. State responsibility had thus been transformed by way of progressive development, and the Commission must ensure that the expectations of the international community and, in particular, of the new States that had come into existence after the classical rules of international law on the topic had been formulated, were not disappointed.

52. His delegation very warmly congratulated the Special Rapporteur on the remarkable job he had done on the topic. He had succeeded in modernizing and streamlining the text with the assistance of the Drafting Committee. It had been necessary to remove certain elements — notably article 19 of Part One relating to State crimes — in order to arrive at long last at a conclusion by way of compromise. The Commission could take credit for the result, and his delegation could accept and support it, since it recognized that the better was the enemy of the good and that making international law was the art of the possible.

53. The absence from the Commission's draft of any provision for dispute settlement was indeed a shortcoming. His delegation had always strongly advocated the position that, as a matter of principle, all multilateral legal treaties concluded under the auspices of the United Nations should include a comprehensive, expeditious and viable dispute settlement system entailing a binding decision regarding all disputes arising out of the provisions of the treaty in question. For Cyprus that position was dictated by its attachment to the general principle of equal justice for all States and its national interest as a small and relatively weak State which needed the protection of the law, impartially and objectively administered, in order to safeguard its legitimate rights. Cyprus also attached a special importance to the establishment of an effective dispute settlement mechanism, which was the *conditio sine qua non* of a well-functioning legal regime of State responsibility. Of course, as was expressed in paragraph 60 of its report, the Commission was leaving it to the General Assembly to consider whether and in what form provisions for dispute settlement could be included in the event that the Assembly should decide to elaborate a convention; that solution, however, was not fully satisfactory.

54. As for the form of the draft articles, Cyprus, along with many other States, notably the Nordic States, had stated in last year's debate that its preference was for a legally binding convention, which would take its place alongside other major codification projects such as the Vienna Convention on the Law of Treaties, the Law of the Sea Convention and, most recently, the Rome Statute of the International Criminal Court. However, to be realistic, Cyprus did not preclude other alternatives provided that its basic concerns were met, and it noted that several suggestions had been made, including the inscription of the topic as a specific item on the agenda of a subsequent session of the General Assembly. Under those circumstances, the delegation of Cyprus could accept the Commission's recommendation in paragraph 67 of its report, namely, that the Assembly should in a resolution take note of the draft articles and annex the text of the articles to that resolution, but it would nevertheless strongly support the position that the resolution in question should also propose that, given the importance of the topic, the Assembly should at the second stage consider the adoption of a convention on the topic, including compulsory third party dispute settlement provisions. That might prove to be an unrealistic aspiration, but at least the door was being kept open. Thus his delegation could, with some reluctance, accept the Commission's recommendations as spelled out in paragraphs 72 and 73 of the report, while also accepting the proposed change in the title of the topic.

55. His delegation had noted the various points of view expressed regarding serious breaches of obligations to the international community as a whole, and agreed that chapter III of Part Two should be retained and that the clear emphasis should be on peremptory norms as reaffirmed in the 1969 Vienna Convention on the Law of Treaties. In that connection, and generally with regard to *jus cogens*, he drew attention to document A/CN.4/454 of 9 November 1993, which contained much relevant material of direct interest to the consideration of that very important notion. Furthermore, the distinction between "serious breaches" of peremptory norms and trivial or mild breaches of such norms was difficult to apply. The presumption should be that breaches of peremptory norms were always serious.

56. As for countermeasures, which were the subject of Part Two, chapter II, they should be restricted and narrowly defined, as they lent themselves to abuse at the expense of weaker States. They should be aimed at reparation, rather than punishment. They should be applied objectively and be proportional and subject to third party dispute settlement provisions. Armed countermeasures, which were contrary to Article 2, paragraph 4, of the Charter of the United Nations, were contrary to customary law as well as to *jus cogens*. In that connection one was reminded of the well-known dictum of the International Court of Justice in the *Corfu Channel* case. Other rules of *jus cogens*, including human rights rules, were not subject to derogation in the case of countermeasures. In light of those considerations Cyprus had determined its position regarding the Commission's proposed draft articles on the topic.

57. His delegation had carefully noted and fully accepted the general provisions set out in Part Four applicable to the draft articles as a whole. Article 55, which was based on the principle *lex specialis derogat legi generali*, made clear that the articles had a residual character and, in case of inconsistency, pointed out that the special rule prevailed. It was rightly stated in the commentary that "States cannot, even as between themselves, provide for legal consequences of a breach of their mutual obligations which would authorize acts contrary to peremptory norms of general international law". Indeed, the essence of peremptory norms was that they could not be derogated from by agreement between the parties *inter se* because that would be contrary to international public policy.

58. Article 56 made it clear that the draft articles were not exhaustive and did not affect other applicable rules of international law on matters not dealt with. Examples cited in the commentary included the invalidity of a treaty procured by an unlawful use of force, a fundamental change of circumstances or termination in the case of a material breach, all stemming from the law of treaties and not from the rules of State responsibility. Article 57 excluded from the scope of the articles questions concerning the responsibility of an international organization or of any State for the conduct of an international organization. Article 58 was also a saving clause regarding the question of the individual responsibility under international law of any person acting on behalf of a State. However, as the commentary correctly pointed out, "The State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out", a principle reflected in article 25, paragraph 4, of the Rome Statute of the International Criminal Court. Finally, article 59 reserved the effects of the Charter of the United Nations. The commentary made it clear that the articles were in all respects to be interpreted in conformity with the Charter of the United Nations, and that the principle under Article 103 of the Charter that in the event of a conflict between the obligations under the Charter and obligations under any other international agreement, the obligations under the Charter should prevail.

59. Under chapter V, Circumstances precluding wrongfulness, his delegation had carefully noted article 20, on consent. The previous year his delegation had stated that the issue of consent, which must be freely given, should be approached with caution, since the very essence of the notion of *jus cogens* was that the parties could not derogate from it by agreement between them because that would be incompatible with international public policy. In that same context of draft article 20, on consent, his delegation had stated that it fully shared the Israeli delegation's expression of regret that the exception regarding the ineffectiveness of consent in case of peremptory obligation, as contained in draft article 29 of 1996, had not been retained. He pointed out that the commentary on draft article 20 discussed certain modalities which needed to be observed for consent to be considered valid, and reference was made to "cases in which consent may not be validly given at all", with a cross reference to draft

article 26, on compliance with peremptory norms, which applied to chapter V as a whole.

60. Paragraphs 5 and 6 of the commentary on article 26, as well as paragraph 9 of the commentary on article 45 relating to loss of the right to invoke responsibility, were pertinent in that regard. While paragraph 5 of the commentary to article 26 enumerated the peremptory norms recognized as such under the criteria of article 53 of the Vienna Convention of 1969, referring to aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination, there was no express reference to the use of force in violation of Article 2, paragraph 4, of the Charter and which might or might not in all cases be covered by the term "aggression", a point which needed to be borne in mind given the uncertainty surrounding the term and the role of the Security Council in that regard. He also noted that paragraph 6 of the commentary to draft article 26 stated that "One State cannot dispense another from the obligation to comply with a peremptory norm [...] whether by treaty or otherwise". While a valid consent might be relevant for a lawful purpose, it could not negate an applicable peremptory norm or make legal what would be illegal under an applicable peremptory norm, for the reasons stated earlier.

61. Turning to draft article 21, on self-defence, he recalled that Article 51 of the Charter preserved a State's inherent right of self-defence if an armed attack occurred until such time as the Security Council had taken appropriate measures. Accordingly, to that extent and within those limits, a State acting in self-defence was not in breach of Article 2, paragraph 4, of the Charter.

62. His delegation attached particular importance to chapter III of part two, containing articles 40 and 41 and concerning serious breaches of obligations under peremptory norms of general international law. Under Article 2, paragraph 6, of the Charter, "The Organization shall ensure that States which are not Members of the United Nations act in accordance with these principles so far as may be necessary for the maintenance of international peace and security." Under Article 103 of the Charter, "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." In its *dictum* in the *Barcelona Traction* case and, more recently, in the *East Timor* and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* cases, the International Court of Justice had made it clear that, for the purposes of State responsibility, certain obligations were owed to the international community as a whole and that, by reason of the importance of the rights involved, all States had an interest in their protection.

63. Under articles 53 and 64 of the Vienna Convention on the Law of Treaties (1969), the concept of peremptory norms of international law had been accepted, following recognition of the existence of substantive norms of a fundamental character such that no derogation from them was permitted, even by treaty. For his delegation, the proposed chapter III was a compromise which made it possible to put an end to the long-standing controversy surrounding article 19 on the question of international crimes as offences distinct from international delicts. It represented an acceptable compromise, particularly in the light of new developments in the area of individual criminal responsibility, such as the adoption in 1998 of the Rome Statute of the International Criminal Court. His delegation was pleased to see in the commentary on and footnotes to that chapter, that the concept of peremptory norms of general international law was recognized in international practice, in the jurisprudence of national and international courts and in legal doctrine. At the Vienna Conference on the Law of Treaties, Cyprus, together with other States, had played an active role in promoting acceptance of that notion. His delegation also drew attention to the fact that not only "aggression" but also the "unlawful use of force contrary to the principles of the Charter" were prohibited by *jus cogens*, as footnotes 675 and 679 to the report under consideration indicated.

64. His delegation noted that, under article 41, all States must cooperate to bring to an end through lawful means any serious breach within the meaning of article 40 and that no State should recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation. It was therefore a question of obligations of non-recognition, non-assistance and cooperation to bring the breach to an end. His delegation had taken careful note of the commentary and the footnotes accompanying the draft article and fully subscribed to them. In addition to footnote 697, which cited the *Loizidou v. Turkey, Merits* case of 1996

and the judgement handed down by the European Court of Human Rights in the *Cyprus v. Turkey* case, attention should be drawn, in the context of paragraph 4 of the commentary concerning the reaction of the Security Council to the invasion of Kuwait by Iraq in 1990, to the equally clear position of the Security Council in its resolutions 541 (1983) and 550 (1984). As in the case of Kuwait, no State had recognized the legality of the action undertaken in Cyprus on 15 November 1983 but, unlike the attempted annexation of Kuwait which had subsequently been reversed, no reversal had yet taken place in the case of Cyprus.

65. With reference to part III, his delegation had noted its content and, generally speaking, it agreed with the approach on the invocation of responsibility of a State by the specifically injured State and, when circumstances permitted, where an obligation was owed to the international community as a whole. It had also taken note of chapter II on countermeasures and recalled the need for dispute settlement procedures in that regard. It noted the approach taken in draft articles 49 to 54 and particularly welcomed the provisions of article 50, paragraph 1, and its commentary. Indeed, countermeasures should not affect: (a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations; (b) obligations for the protection of fundamental human rights; (c) obligations of a humanitarian nature prohibiting reprisals; and (d) other obligations under peremptory norms of general international law. The reference to "other" obligations under peremptory norms was particularly apt in that context in that it indicated clearly that the prohibitions of subparagraphs (a), (b) and (c) of paragraph 1 could also be counted as peremptory norms. Moreover, the very clear wording of subparagraph (a), stating "the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations," was preferable to the references to "aggression" found elsewhere in the commentaries.

The meeting rose at 5.20 p.m.